

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD W. PRITCHARD

Claimant

VS.

WESTERN TRAILER SERVICE

Respondent

AND

UNITED STATES FIDELITY & GUARANTY CO.

Insurance Carrier

Docket No. 158,614

AND

RICHARD W. PRITCHARD

Claimant

Vs.

WESTERN TRAILER SERVICE

Respondent

And

UNITED STATES FIDELITY & GUARANTY CO.

Insurance Carrier

And

KANSAS WORKERS COMPENSATION FUND

Docket No. 158,615

ORDER

On the 14th day of March, 1995, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Alvin E. Witwer on December 21, 1994, came on for oral argument in Kansas City, Kansas.

APPEARANCES

Claimant appeared in person and by and through his attorneys, Edward B. Rucker of Kansas City, Missouri and Steven D. Treaster of Overland Park, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Joseph R. Ebbert of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jeffrey A. Dehon of Kansas City, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Docket No. 158,614

1. What is the nature and extent of claimant's injury and disability?

Docket No. 158,615

1. What is the nature and extent of claimant's injury and disability?
2. What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 158,614

Having reviewed the whole evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

In Docket No. 158,614, the Appeals Board finds the findings of the Administrative Law Judge accurately set out, both factually and legally, the appropriate finding of fact and conclusions of law in this matter; and further, that the findings of fact and conclusions of law of the Administrative Law Judge is adopted by the Appeals Board as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, in Docket No. 158,614 dated December 21, 1994, is hereby affirmed in all respects and an award is entered in accordance with the above findings in favor of the claimant, Richard W. Pritchard, and against the respondent, Western Trailer Service and its insurance carrier, United States Fidelity and Guaranty Company.

Claimant is entitled to 74.71 weeks temporary total disability compensation at the weekly rate of \$278.00 in the sum of \$20,769.38, followed by 340.29 weeks of permanent partial disability compensation at the rate of \$111.01 per week for a 25% permanent partial general disability to the body as a whole in the sum of \$37,775.59 making a total award of \$58,544.97.

As of April 18, 1995, there is due and owing claimant 74.71 weeks temporary total compensation at the rate of \$278.00 per week in the sum of \$20,769.38, followed by 129.72 weeks of permanent partial general body disability compensation at the rate of \$111.01 per week in the sum of \$14,400.22 making a total due and owing of \$35,169.60 which is ordered paid in one lump sum less any amounts previously paid. Thereafter the remaining balance of 210.57 weeks permanent partial general disability shall be paid at the weekly rate of \$111.01 per week in the total sum of \$23,375.37 until fully paid or by further order of the Director.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 158,615

On June 10, 1991, while opening a trailer door, claimant slipped in the mud, injuring his right shoulder. Claimant underwent surgery by Dr. Curnow on the right shoulder but the medical records of Dr. Curnow are not contained in the file. Claimant underwent an independent medical examination by Dr. Edward J. Prostic on June 17, 1993, at claimant's attorney's request. Dr. Prostic assessed claimant a thirty percent (30%) whole body functional impairment for his injury to his right shoulder and restricted him against using his hand at or above shoulder level and further advised claimant to avoid lifting, carrying, reaching, pushing and pulling on a sustained basis.

Claimant underwent an independent medical examination by order of the Administrative Law Judge with Dr. Fred A. Rice, Jr. on January 5, 1994. Dr. Rice rated claimant at twenty-four percent (24%) to the right upper extremity for the injury suffered to the right shoulder which converts to a fourteen percent (14%) permanent partial whole body impairment on a functional basis. Dr. Rice did not go into significant detail regarding what, if any, restrictions would apply to claimant's right shoulder.

Claimant was evaluated by Donald R. Vogenthaler, Rh.D., a vocational economic analyst, at claimant's attorney's request. Mr. Vogenthaler opined claimant had suffered significant loss of access to the open labor market and loss of ability to earn a comparable wage, rating both at one-hundred percent (100%). Mr. Vogenthaler was asked to separate claimant's right shoulder and left shoulder regarding work disability, which he did not do. He was also asked about the effect claimant's pre-existing bilateral arthritic ankles had upon his ability to access the open labor market and earn comparable wages. He did testify that, considering the ankles only, claimant's loss of access to the open labor market was seventy-nine percent (79%). He felt that since claimant was not working his loss of ability to earn comparable wages, as a result of the ankles, would be one-hundred percent (100%).

Mr. Vogenthaler agreed that using the medical restrictions of the doctors, claimant would not be one-hundred percent (100%) disabled from performing work in the open labor market. The failure of Mr. Vogenthaler to separate or apportion his findings with regard to each of the shoulders, is damaging to his opinion. Further, Mr. Vogenthaler's opinion that claimant is one-hundred percent (100%) disabled from obtaining work in the open labor market or earning comparable wages is not justified by the medical restrictions placed upon him by the doctors. As such the Appeals Board finds the opinion of Mr. Vogenthaler to lack credibility and same is rejected by the Appeals Board.

In proceedings under the Workers Compensation Act the burden of proof is on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. See K.S.A. 44-501 and

K.S.A. 44-508(g). This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board finds claimant has failed in his burden of proving his entitlement to a work disability in this matter. K.S.A. 1990 Supp. 44-510e(a) states in part:

"... except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

K.S.A. 1990 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Prostig opined claimant suffered a thirty percent (30%) whole body functional impairment as a result of the injuries to his right shoulder. Dr. Rice, in his independent medical examination, opined claimant had suffered a fourteen percent (14%) whole body functional impairment as a result of the injury suffered to his right shoulder. In evaluating the medical reports, the Appeals Board finds no justification in placing greater emphasis on the report of one doctor over that of another. As such, the Appeals Board finds the claimant has suffered a twenty-two percent (22%) permanent partial disability to the body as a whole on a functional basis as a result of the injuries suffered to his right shoulder on June 10, 1991.

AWARD

WHEREFORE, it is the finding, decision and Order of the Appeals Board that the Order of Administrative Law Judge Alvin E. Witwer, dated December 21, 1994, shall be, and is hereby, modified in that an Award of compensation is entered in favor of the claimant, Richard W. Pritchard, and against the respondent, Western Trailer Service, and its insurance carrier, United States Fidelity & Guaranty Company, and the Kansas Workers Compensation Fund, for a 22% permanent partial general disability to the body as a whole on a functional basis.

Claimant is entitled to 26 weeks temporary total disability compensation at the weekly rate of \$278.00 in the sum of \$7,228.00, followed by 389 weeks of permanent partial disability compensation at the weekly rate of \$99.38 per week, totalling \$38,658.42, for a total award of \$45,886.42.

As of April 18, 1995, there would be due and owing claimant 26 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$7,228.00, followed thereafter by 175.29 weeks permanent partial disability compensation at the rate of \$99.38 per week, totalling \$17,420.32, for a total due and owing of \$24,648.32 due in one lump sum less any amounts previously paid. Thereafter the claimant is entitled to 213.71 weeks permanent partial disability compensation at the rate of \$99.38 per week totalling \$21,238.50 until fully paid or further order of the Director.

The Administrative Law Judge assessed 100% of the liability in Docket No. 158,615 to the Kansas Workers Compensation Fund. The Workers Compensation Fund did not contest said finding so long as work disability was not awarded by the Appeals Board. As there was no contest of this finding, the Appeals Board finds the entire liability in Docket No. 158,615 shall be borne by the Kansas Workers Compensation Fund, with respondent and its insurance carrier being entitled to reimbursement for any sums paid for medical care, temporary benefits, permanent benefits, or costs in said docket to be reimbursed from the Kansas Workers Compensation Fund.

Relative to Docket Nos. 158,614 and 158,615:

Claimant's contract of employment with his attorneys Mr. Edward B. Rucker and Mr. Steve D. Treaster is approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Workers Compensation Act are assessed 50% against the respondent and its insurance carrier and 50% against the Kansas Workers Compensation Fund for both Docket Nos. to be paid as follows:

Hostetler & Associates, Inc.	\$464.75
Dwight Carlson, C.S.R.	\$294.20

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Edward B. Rucker, Kansas City, MO
 Steven D. Treaster, Overland Park, KS
 Joseph R. Ebbert, Kansas City, KS
 Jeffrey A. Dehon, Kansas City, KS
 Alvin E. Witwer, Administrative Law Judge
 George Gomez, Director